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No. 03-1230

Supreme Court, U.S.
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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., and USF HOLLAND, INC.

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL,

Respondents.

On Petition For Writ of Certiorari To The Michigan Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Michigan Motor Carrier Act motor carriers must pay an annual fee of $100 per vehicle to operate intrastate. Petitioners assert requiring the $100 fee for a vehicle that conducts both intrastate and interstate transportation violates the Commerce Clause. Petitioners failed to present evidence to the trial court that any trucking firm's route choices were affected by the imposition of the fee and only offered hypotheticals in support of their case. Based on the record before it, the Michigan Court of Appeals found that any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination. Further, the Michigan Court of Appeals found the $100 fee is not clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways.

The questions presented are:

Where Petitioners failed to present evidence to support their claims, did the Michigan courts properly grant summary disposition against them?

Did the Michigan Court of Appeals correctly conclude, based on the record before it, that the $100 fee was not discriminatory, was not clearly excessive, and did not violate the Commerce Clause?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanverkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab, Inc., Deeco Services, Inc., d/b/a Deeco Transportation, Tiberio Frank, d/b/a Fairfield Towing, Elex, Inc., d/b/a Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc., d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc., d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals (Pet. App. 1a-32a) is published and reported as *Westlake Transportation, Inc v Michigan Public Service Comm*, 255 Mich App 589; 662 NW2d 784 (2003). The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal (Pet. App. 61a-63a) is published and reported at 469 Mich 969; 673 NW 2d 752 (2003). The trial court rulings are unpublished.

JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' Application for Leave to Appeal was entered December 3, 2003. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Michigan Court Rule (MCR) 2.116, provides in relevant part:

> (B) Motion.
>
> (1) A party may move for dismissal of or judgment on all or part of a claim in accordance with this rule. A party against whom a defense is asserted may move under this rule for summary disposition of the defense. A request for dismissal without prejudice under MCL 600.2919c; MSA 27A.2912(3) must be made by motion under MCR 2.116 and MCR 2.119.
>
> * * *
>
> (C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> * * *
>
> (10) Except as to the amount of the damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

Section 478.2(1) of the Michigan Compiled Laws (MCL) provides in relevant part:

> In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each such motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier[.]

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

STATEMENT

1. Statutory Framework

Under MCL 478.2(1), motor carriers operating intrastate under a certificate of authority issued by the Michigan Public Service Commission (MPSC) are required to pay annually $100 for each vehicle utilizing that intrastate certificate of authority, even if the vehicle also conducts interstate transportation.

The Michigan Court of Claims, the Michigan Court of Appeals, and the Michigan Supreme Court have all considered Petitioners' claim that MCL 478.2(1) is unconstitutional under the Commerce Clause. Based on the record before them, none of these courts have found any merit to Petitioners' claims.

2. Court Proceedings.

a. Michigan Court of Claims

In *Westlake, et al*, Docket No. 95-15628-CM and *Troy Cab, et al*, Docket No. 95-15631-CM, Westlake and Troy Cab both challenged the lawfulness of the collection of fees pursuant to the Michigan Motor Carrier Act (MCA), MCL 475.1, *et seq.* The Petitioners filed a Motion to Intervene and, on March 8, 1995, the motion was granted. These cases were certified as a class action proceeding on June 9, 1995.

On June 30, 1995, the Petitioners filed their Motion for Partial Summary Disposition seeking a declaration that the $100.00 decal fee imposed by MCL 478.2(1) violated the Commerce Clause of the U.S. Constitution.

On October 13, 1998, the Michigan Court of Claims issued its Opinion, finding that Petitioners' motion was without merit and denying the motion (Pet. App. 33a-45a). The Court granted the State Defendants' Motion for Summary Disposition (Res. App. 1b- 2b). On March 7, 2000 the Court denied Plaintiffs' Motion for Reconsideration (Pet. App. 46a – 60a). Petitioners filed their Claim of Appeal to the Michigan Court of Appeals on March 27, 2000

b. Michigan Court of Appeals.

The Court of Appeals, on March 11, 2003, issued its Opinion in the consolidated appeals. It affirmed in its entirety the Court of Claims summary disposition ruling in favor of the State Defendants, although in reaching the same conclusions on the Commerce Clause allegations its reasoning differed from that of the Court of Claims. The Court of Appeals, 235 Mich App at 619-622, stated:[1]

> [A]ny tax or regulation that affects interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. *Citizens for Logical Alternatives & Responsible Environment v Clare Co Bd of Comm'rs*, 211 Mich App 494, 499; 536 NW2d 286 (1995). Because the fee is imposed on any vehicle that operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause.
>
> * * *
>
> The test for determining whether a regulatory fee violates the Commerce Clause involves a two-tiered

[1] The Respondents' quotation is taken from the official report that commences at 255 Mich App 589. The Petitioner reproduced the Michigan Court of Appeals slip opinion in its Appendix, including several typographical errors that were corrected upon publication. The Respondents, however, will cite the corrected text from the official reporter.

> approach. [fn omitted.] The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Oregon Waste, supra* at 99. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The United States Supreme Court has recognized that there is no clear line separating the two categories. The critical consideration is the overall effect of the statute on both local and interstate activity. *Brown-Forman Distillers Corp v New York State Liquor Auth*, 476 US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). A state law will be invalidated if it "discriminates against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc v Town of Clarkstown, New York*, 511 US 383, 390; 114 S Ct 1677; 128 L Ed 2d 399 (1994).
>
> In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers that are licensed in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $100 for each vehicle. MCL 478.2(2) requires that motor carriers that are licensed in Michigan and travel solely interstate must also pay the $100 fee. Therefore, the regulatory fee is the same for all motor carriers licensed in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Coop Corp v Arkansas Pub Service Comm*, 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983).
>
> * * *
>
> Having concluded that the statute regulates even-handedly, it will be upheld unless the burden it imposes

on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, supra* at 142. Intervening plaintiffs do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations. This is an exercise of the State's police power and serves a critical function in protecting the people who use Michigan's highways. Great deference is given to state legislation in the field of highway safety regulation and a strong presumption in favor of its validity exists. *Raymond Motor Transportation, Inc v Rice*, 434 US 429, 443; 98 S Ct 787; 54 L Ed 2d 664 (1978). On the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause.

On April 1, 2003, Petitioners American Trucking Associations, Inc. and TNT Holland Motor Express, Inc. filed an application for leave to appeal with the Michigan Supreme Court.

c. Michigan Supreme Court

On December 3, 2003, the Michigan Supreme Court denied the applications for leave (Pet. App. 61a – 63a).

REASONS FOR DENYING THE PETITION

The decision of the Michigan Court of Appeals is correct and does not conflict with any decision of this Court or with the decisions from other states or jurisdictions.

A. Under Michigan Court Rule 2.116(C)(10), a motion for summary disposition is properly granted against a party when that party fails to present evidence to support its claim. The Petitioners failed to present evidence to support their claim that Michigan Compiled Law 478.2(1) violated the Commerce Clause. After determining that the Petitioners' claim was "a matter of pure speculation" the Michigan Court of Appeals properly affirmed the trial court's grant of summary disposition against Petitioners.

The Commerce Clause violation alleged by the Petitioners is, as was noted below by the Michigan Court of Appeals (255 Mich App at 621), one of pure speculation:

> Intervening plaintiffs argue that the mixed carrier invariably will pay a higher per-mile fee than the carrier who operates solely intrastate. They assert that because the fee is a flat annual fee, in order to receive the greatest benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decisions by discouraging an intrastate carrier from engaging in interstate commerce.
>
> While this may be so, it is a matter of pure speculation. Intervening plaintiffs present no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in a hypothetical case. Only one affidavit was submitted by intervening plaintiffs, in which James Crozier, manager of licensing and fuel for intervening plaintiff TNT Holland Motor Express, Inc., stated that mixed carriers often top off their interstate loads with intrastate

> hauls or transport intrastate loads in between interstate hauls. However, he never averred that this was done only because of the fee imposed by MCL 478.2(1). Regardless of the $100 fee, topping off loads or adding intrastate hauls in between interstate ones is an economically efficient decision for the motor carriers. We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination.

In short, the Petitioners failed to present evidence sufficient to support its claim that the challenged Michigan law violates the Commerce Clause. As the Michigan Court of Appeals opinion demonstrates the Petitioners failed to establish a nexus between the harm alleged (which was unproven)[2] and the statute which it challenged. As a result the trial court properly granted summary disposition to the Respondents pursuant to Michigan Court Rule (MCR) 2.116(C)(10).[3]

In the Michigan trial courts, a motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed de novo by Michigan courts on appeal. *Spiek v Dept of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), the Michigan Supreme Court addressed the legal standard under which motions brought pursuant to MCR 2.116(C)(10) are to be decided, as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for

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[2] Even the $70 million amount that Petitioners assert is the amount at issue in this litigation (Pet. 26) is not supported by the record.

[3] MCR 2.116(C)(10) provides:

> Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

> summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(5).
>
> A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
>
> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rules. The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [Citations omitted.]

Thus even if the Petitioners had stated a *prima facie* case when before the trial court they were also required to show there is a genuine issue of material fact, of an undue burden on interstate commerce that is based on something more than mere conjecture. This the Petitioners failed to do. *Durant v Stahlin*, 375 Mich 628, 638; 135 NW2d 392 (1965); *Anderson v Kemper Insurance Co.*, 128 Mich App 249, 252-253; 340 NW2d 87 (1983). Therefore, under the Michigan Court Rules, a party, when challenged, must show that it has a case on the law *and* that there is some evidentiary proof of specific facts to support its allegations. *Durant* at 638; *Remes v Dobys*, 87 Mich App 534,

537-538; 274 NW2d 64 (1978). If a party opposing a MCR 2.116(C)(10) motion fails to present such evidentiary proofs, summary disposition is properly granted. *Smith v Globe Life Ins Co.*, 460 Mich 446, 455-456 n2; 597 NW2d 28 (1999). Having waived the opportunity to present evidence to support their claim, Petitioners should neither be allowed to avoid MCR 2.116(C)(10) nor be heard to complain.

B. MCL 478.2(1) does not violate the Commerce Clause.

Section 478.2(1) of the Michigan Compiled Laws provides in relevant part:

> In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each such motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier[.]

Petitioners assert that collecting the $100 fee from a motor carrier vehicle that provides both intrastate and interstate transportation violates the Commerce Clause.

The Commerce Clause provides that Congress "shall have power. . . [t]o regulate commerce. . . among the several states. . . ." US Const, art I, § 8, cl 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dept of Environmental Quality of the State of Oregon*, 511 US 93, 98 (1994).

In analyzing whether a state statute violates the Commerce Clause, this Court in *Oregon Waste, supra,* 99 stated:

> Consistent with these principles, we have held that the first step in analyzing any law subject to judicial scrutiny

> under the negative Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes, supra, at 336.* See also *Chemical Waste, 504 U.s. at 340-341.* As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. *Id., at 344, n. 6.* See also *Philadelphia v. New Jersey, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978).* By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).*

In determining that MCL 478.2(1) was not discriminatory, the Michigan Court of Appeals stated:

> In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers that are licensed in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $ 100 for each vehicle. MCL 478.2(2) requires that motor carriers that are licensed in Michigan and travel solely interstate must also pay the $ 100 fee. Therefore, the regulatory fee is the same for all motor carriers licensed in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc.*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Co-op Corp v Arkansas Pub Service Comm*, 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983). 255 Mich App at 620.

In presenting its case at the state level, the Petitioners failed to present evidence demonstrating the discriminatory nature of the $100 fee. They only posed a number of hypotheticals and asked the Michigan courts to accept the hypotheticals as fact. This pattern has continued in their petition. For example, Petitioners' discussion on page 3 of an interstate carrier making a single intrastate delivery is not supported in the record below. On page 22, Petitioners stated, "[o]n average, a trucking company that confines its operations to intrastate travel will drive for more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will a company that travels both intra- and interstate." There is no evidentiary support in the record for this assertion.

The discussion on pages 6 and 7 asserting the fee is discriminatory does not rely on facts in the record but, rather quotes, out of context, language from the Michigan Court of Appeals. The Michigan Court of Appeals concluded that Petitioners presented no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could happen in the hypothetical. "We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination." 255 Mich App at 621.

Having found the effect of the fee did not rise to the level of discrimination, the Michigan Court of Appeals examined the burden the fee imposes on interstate commerce. In evaluating the burden on interstate commerce, this Court in *Pike v Bruce Church, Inc*, 397 US 137, 142 (1970), stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co v Detroit,* 362 US 440, 443; 4 L Ed 2d 852,

> 856; 80 S Ct 813; 78 ALR 2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with less impact on interstate activities.

This balancing test inherently recognizes that state regulation may have some effect upon interstate commerce, yet such regulation will not be invalid for that reason alone. Rather, the test balances the local and interstate interests involved.

MCL 478.2(1) constitutes a valid exercise of the state's police power. This Court has declared that the Commerce Clause does not withhold from the states the power to regulate matters of local concern where Congress has not exercised its power, even though the regulation affects interstate commerce. In *Lewis v BT Investment Managers, Inc,* 447 US 27, 35-36 (1980), this Court stated that the Commerce Clause "limitation upon state power . . . is by no means absolute" and that "[i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected," citing *Raymond Motor Transportation, Inc v Rice,* 434 US 429, 440 (1978), and *Great A & P Tea Co v Cottrell,* 424 US 366, 371 (1976).

As the Michigan Court of Appeals noted, the Petitioners, "do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations." 255 Mich App at 622. In *Huron-Portland Cement Co v Detroit,* 362 US 440 (1960), this Court held that a local air control ordinance was not unconstitutional as a burden on interstate commerce when it was applied to steam vessels operating in interstate commerce that were licensed and comprehensively regulated by the federal government. The Court found that the city code was an exercise of the police power, and that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the

normal incidents of local police power, not constituting a direct regulation of commerce." (362 US at 447) The Court concluded that "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." (362 US at 448)[4]

MCL 478.2(1), directed to intrastate authority and the associated fee, represents a valid exercise of the state's police powers intended to accomplish legitimate local purposes relating to intrastate transportation. MCL 478.2(1) does not have a purpose of regulating interstate operations or vehicles, and if at all, only minimally or incidentally affects interstate commerce.

C. The Michigan Court of Appeals correctly held that the four pronged test enunciated in *Complete Auto Transit, Inc. v Brady*, 430 US 274 (1977), *reh den* 430 US 976 (1977), is not applicable to MCL 478.2(1). However, even if *Complete Auto* were to be applied, MCL 478.2(1) is constitutional.

Petitioners assert that the Michigan Court of Appeals erred by not applying an analysis under *Complete Auto Transit, Inc. v Brady*, 430 US 274 (1977) *reh den* 430 US 976 (1977). The Michigan Court of Appeals disagreed, 255 Mich App 619, n 15, stating:

> Intervening plaintiffs contend that the four-pronged test enunciated in *Complete Auto Transit, Inc v Brady*,

[4] This Court, on numerous occasions, has similarly held that a state statute passed pursuant to the legitimate use of the state's police powers is not a burden on interstate commerce although it may affect commerce. See, *Savage v Jones*, 225 US 501 (1912); *Bradley v Ohio Public Utilities Comm*, 289 US 92 (1933); *Kelly v Washington*, 302 US 1 (1937); *South Carolina State Hwy Dep't v Barnwell Bros*, 303 US 177 (1938); *Southern Pacific Co v Arizona ex rel Sullivan*, 325 US 761 (1945); *Panhandle Eastern Pipe Line Co v Indiana Public Service Comm*, 332 US 507 (1947); *Head v New Mexico Board of Examiners in Optometry*, 374 US 424 (1963).

> 490 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 926 (1977), and utilized in *American Trucking Ass'ns, Inc. v Scheiner*, 483 US 266, 283; 107 S Ct 2829; 97 L Ed 2d 226 (1987), is applicable. However, this test is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, *Complete Auto*, *supra*, at 279, not regulatory statutes.

Yet, even under the *Complete Auto Transit* analysis, Petitioners' arguments fail.

Even assuming, as Petitioners do, that the fee in this case is a tax, it still remains that Michigan's challenged intrastate fees are also constitutional under *Complete Auto Transit, supra.* In *Complete Auto Transit,* this Court addressed a Commerce Clause challenge to a Mississippi tax for the privilege of carrying on, within the state, certain activities related to a corporation's operation of an interstate business. The appellant, Complete Auto Transit, Inc., was a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors who assembled the vehicles outside of Mississippi and then shipped them by rail to Jackson, Mississippi, where they were loaded onto appellant's trucks and transported by appellant to Mississippi dealers within the state. The tax in question was a 5% Mississippi sales tax assessed against Complete Auto Transit, Inc. for the transportation of property for-hire between points within the State of Mississippi. Complete Auto Transit, Inc. argued that the 5% tax on gross income of its intrastate business was unconstitutional as applied to its operations in interstate commerce. Complete Auto Transit claimed that its transaction was but one part of an interstate movement. This Court upheld the Mississippi tax using a four-part test.

This test was articulated in *Goldberg v Sweet,* 488 US 252, 257 (1989), as follows:

> Under the four-pronged test originated in *Complete Auto*, a state tax will withstand scrutiny under the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Applying each part of that test to the fee challenged by the Petitioners leads but to one conclusion, i.e. the fee does not violate the Commerce Clause.

1. MCL 478.2(1) applies to an activity having a substantial nexus with Michigan.

The first part of the four-pronged test enunciated in *Complete Auto Transit, Inc, supra,* requires a Court to determine whether the tax is applied to an activity having a substantial nexus with Michigan. Petitioners do not challenge the substantial nexus requirement. Since MCL 478.2(1) charges motor carriers $100 for each vehicle the motor carrier chooses to assign for intrastate operations only, the fee has the strongest possible nexus with Michigan. This is particularly true since intrastate transportation is defined as the pick-up of persons or property from a point in the state to delivery of the persons or property to a point in the state, without a prior or subsequent interstate move.

Even the hypothetical scenario that in conducting interstate operations a carrier may wish to make a purely intrastate pick-up and delivery in Michigan does not change the fact that MCL 478.2(1) applies only to the intrastate activity of the vehicle.

2. MCL 478.2(1) is fairly apportioned.

The second prong of the *Complete Auto* test requires a Court to determine whether the fees under MCL 478.2(1) are fairly apportioned. In *Goldberg, supra*, this Court stated, "The central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction."

The Court in *Container Corp v Franchise Tax Board,* 463 US 159, 164 (1983) noted that the apportionment determination "is often an elusive goal, both in theory and in practice."

In the present case, MCL 478.2(1) is internally consistent because no more than 100% of a carrier's intrastate activity is being taxed. If every state in the Union were to impose an identical fee to that contained in MCL 478.2(1), no multiple taxation violating the Commerce Clause would result for the reason that each separate state would only be charging for intrastate operations in that same state.

In *Oklahoma Tax Comm v Jefferson Lines, Inc,* 514 US 175 (1995), the Supreme Court reviewed Oklahoma's state's sales tax on bus tickets sold in Oklahoma for interstate travel based upon the four-pronged test of *Complete Auto Transit, supra.* Jefferson Lines, a Minnesota corporation, provided bus services as a common carrier in Oklahoma without remitting the 4% sales tax for tickets it had sold in Oklahoma for bus travel from Oklahoma to other states, although it did collect and remit the taxes for all tickets it had sold in Oklahoma for travel that originated and terminated within that state.[5] Since Jefferson Lines did not challenge the tax on intrastate operations, the Supreme Court reviewed the interstate portion of the tax under the four-pronged test of *Complete Auto Transit, supra.* In applying the second prong of the *Complete Auto* test to Oklahoma's sales tax on bus tickets sold in Oklahoma for interstate travel originating there, this Court stated, 514 US at 185, as follows:

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[5] For purposes of understanding the dichotomy between interstate and intrastate transactions, it is interesting to note that Petitioners challenge the fee imposed for intrastate operations pursuant to MCL 478.2(1), but has not argued in this case that the $100 vehicle fee imposed on interstate carriers for vehicles registered and commercially plated with the Michigan Secretary of State pursuant to MCL 478.2(2) is in violation of the Commerce Clause. Jefferson Lines did not challenge Oklahoma's sales tax on bus tickets for travel intrastate, but did challenge the sales tax on bus tickets for travel interstate.

Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. See *Gwin, White and Prince,* 305 US at 439. There is no failure of it in this case, however. If every state were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the state for travel originating there, no sale would be subject to more than one state's tax.

If the Oklahoma sales tax on the interstate transaction was internally consistent, then it stands to reason that the unchallenged Oklahoma sales tax on intrastate bus travel would also have met the test. The above-referenced explanation by the Supreme Court in the case indicates that internal consistency is a test that compares the burden on interstate commerce to the burden imposed by each individual state. Each state could charge a fee or tax for intrastate operations and be properly apportioned and internally consistent because the burden is on intrastate commerce and not interstate commerce. Petitioners refer to the "potentially crushing, cumulative burdens on trucks traveling in interstate commerce," (Pet. 11), but point to no facts in the record that demonstrate this "crushing" burden. Challenging MCL 478.2(1) as placing an undue burden on interstate commerce seems inappropriate under the Commerce Clause. At the very least, any such burden could only be found in a truly

extraordinary or unique case, with well-proven facts, which certainly does not exist here.

For a state tax to be properly apportioned within the meaning of the second prong of *Complete Auto's* test, "the central purpose [of which] is to ensure that each state taxes only its fair share of an interstate transaction," *Goldberg, supra,* 488 at 260-261, the tax must also be externally consistent. The Supreme Court in *Oklahoma Tax Comm* explained, 514 US at 185, external consistency as follows:

> External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.

As the Supreme Court in *Western Live Stock v Bureau of Revenue,* 303 US 250, 254 (1938), "it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."

In the present case, since no other state is responsible for promoting safety upon and conserving the use of Michigan's highways and the fee imposed pursuant to MCL 478.2(1) is aimed at purely intrastate operations, it is a fair apportionment that Michigan keep 100% of the fee imposed.

3. MCL 478.2(1) does not discriminate against interstate commerce.

The third prong of the *Complete Auto* test requires a Court to determine whether MCL 478.2(1) discriminates against interstate commerce.

Since MCL 478.2(1) imposes a $100 fee on vehicles a motor carrier chooses to utilize to conduct intrastate operations, MCL

478.2(1) cannot be said to be facially discriminatory against interstate commerce. To the contrary, the fee imposed by MCL 478.2(1) is obviously upon intrastate commerce.

Again, since MCL 478.2(1) imposes a fee upon motor carriers who choose to engage in intrastate operations by specific vehicles registered for that purpose it cannot be said to have a discriminatory purpose aimed at interstate commerce. Under Michigan's fee system, motor carriers and their vehicles that are subject to the important safety-related purposes accomplished by the regulatory statutes, framework, and activities, have a close nexus to the state. So, they are required to pay more than motor carriers whose nexus to Michigan is less.

The motor carrier chooses where it will conduct business, the state in which a vehicle is plated, and the use of that vehicle in a given state. Each motor carrier also makes its own good-faith selection of those vehicles it designates as being utilized for intrastate transportation.

Thus, the fees charged for vehicles utilized in intrastate operations cannot be said to discriminate against interstate commerce for purposes of the third prong of the *Complete Auto* test.

4. MCL 478.2(1) is fairly related to the services provided by the State.

The fourth prong of the *Complete Auto* test requires a Court to determine whether the collection of fees pursuant to MCL 478.2(1) are fairly related to the services provided by Michigan.

MCL 478.2(1) expressly states that:

> [i]n addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each motor carrier for the **administration of this act**, an annual fee of $100 for each self-propelled motor vehicle... [emphasis added].

The purpose of the Motor Carrier Act, 1933 PA 254, MCL 475.1, *et seq*, is "to promote safety upon and conserve the use of public highways of the state; . . . ." The purpose and policies section of the statute found at MCL 475.2 states in pertinent part supporting the title's purpose as follows:

> It is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [Michigan Public Service] Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) relieve all future undue burdens and congestion on the highways arising by the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the safety and welfare of the traveling and shipping public in their use of the highways; . . .

The Michigan Public Service Commission[6] and Michigan State Police[7] work closely together to jointly enforce several state safety acts. The fees are utilized to cover the cost of this important regulatory function. No evidence or facts have been presented to suggest that the fees have not been fairly apportioned or allocated for these regulatory purposes. Moreover, it must also be realized that the fees are proper to ensure that the motor carriers most directly using the state's roads and services pay their fair share. No immunity to paying a fair share of important benefits provided at public expense is accorded a company or business activity merely because it engaged in some interstate commerce or is a multi-state company or activity.

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[6] Affidavit of Thomas R. Lonergan (Res. App. 14b-27b).

[7] Affidavit of Timothy J. Yungfer (Res. App. 28b-37b).

The fees collected under MCL 478.2(1) fully satisfy the four-prong *Complete Auto Transit* test.

D. MCL 478.2(1) does not conflict with this Court's decision in *Scheiner*.

In *American Trucking Ass'ns v Scheiner*, 483 US 266 (1987), this Court found that a flat marker fee and a flat axle tax assessed by Pennsylvania on each truck traveling through the state -- whether registered there or not -- violated the Commerce Clause.

The flat taxes were alleged to be in violation of the Commerce Clause in part because they imposed a substantially higher effective rate on trucks registered outside of Pennsylvania, with the lower effective tax rate inuring to the benefit of the local truckers. Quoting *Boston Stock Exchange v State Tax Comm*, 429 US 318, 329 (1977), the Court in *Scheiner* noted that "[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state business 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." 483 US at 269, n 1. In this context, the Court added that "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among the States." 483 US at 282.

The Michigan fee attacked by Petitioners does not resemble the fees in *Scheiner*. While the flat marker fee and flat axle tax in *Scheiner* applied to all trucks traveling through Pennsylvania, Michigan's fee under MCL 478.2(1) relates to only those vehicles assigned by the carrier to haul intrastate loads. Vehicles handling only interstate loads do not pay a fee under MCL 478.2(1). Multiple fees do not result because an intrastate vehicle is confined to Michigan use. Michigan's regulatory statutes and fees do not relate to or adversely affect the Federal Highway Administration (FHA) interstate authority. Thus, unlike *Scheiner*, where an interstate vehicle could be subject to multiple axle taxes (if all states enacted them), regardless of how little travel was

made in a state, Michigan's fees cannot result in multiple fees for interstate transportation and thus, no discriminatory impact can result. If the carrier elects to conduct intrastate transportation in multiple states, then it may be subject to additional state fees. But, such a hypothetical is not addressed by *Scheiner*. Michigan's fees also do not contain the discriminatory discount feature in *Scheiner* given to in-state vehicles.

Finally, even if Michigan's fee structure is a "flat tax," it also falls within the exception allowing such flat assessments in *Scheiner*. In this regard, *Scheiner* recognizes that even if the existing fee structure were to contain some elements of discrimination, that does not automatically render it unconstitutional. In this regard, *Scheiner* notes that where the alternative, even a "flat tax" alternative, is the only "practicable means of collecting revenues from users and the use of a more finely gradated user fee schedule would pose genuine administrative burdens," the flat tax alternative is constitutional. 483 US at 296.

Michigan's regulatory fee is fully consistent with *Aero Mayflower Transit Co v Board of RR Comm'rs*, 332 US 495 (1947), and *Capitol Greyhound Lines v Brice*, 339 US 542 (1950). In *Aero Mayflower Transit Co v Board of RR Comm'rs*, 332 US 495 (1947), *supra*, in which the U.S. Supreme Court rejected a claim that a minimum fee of $15 in a fee structure based on gross receipts was unreasonable even though that would result in a tax fifteen times greater than if the standard percentage calculation had been used. The Court stated:

> [The] Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operating on Montana roads. Appellant was not wronged by its failure to make the full use of the highways permitted. (332 US at 506, n 19).

The *Scheiner* court noted:

> Our disposition [in *Aero, supra*] was thus based on the costs the State would encounter in collecting taxes for vehicles that earned less than $3,000 annually in Montana. (483 US at 296, n 26).

The other case cited by the *Scheiner* Court in support of its proposition that all flat taxes are not unconstitutional is *Capitol Greyhound Lines v Brice,* 339 US 542 (1950), in which the Court upheld a 2% fee on the fair market value of motor vehicles for the use of state highways:

> because of the administrative burden of applying a tax formula that would vary "with every factor affecting appropriate compensation for road use." [483 US at 296, n 26, quoting 339 US at 546.]

As in *Brice,* many of the costs the Commission incurs in the regulatory process are caused by various factors. As in *Brice,* the regulatory fee is not invalid.

Scheiner, Aero Mayflower, and *Brice* therefore collectively stand for the proposition that a state need not devise a regulatory fee that precisely matches the revenues generated from each fee payer with the burdens placed on the state by that fee payer. There has never been a constitutional requirement that the assessments paid by an individual to a government, whether fees or taxes, precisely offset the benefits that each person derives from the government. Such governmental precision is neither practical nor desirable.

In summary, even if the fee imposed under MCL 478.2(1) is considered to be a tax, it still is not unconstitutional under the Commerce Clause as it is not in conflict with either *Complete Auto Transit, supra,* or *Scheiner, supra.*

E. The conflict alleged by the Petitioners does not warrant this Court's review.

The Petitioners claim that the Michigan Court of Appeals decision cannot be reconciled with three decisions that applied the internal consistency test "even when the tax was enacted for ostensibly regulatory purposes and even if it was denominated a 'fee.'" (Pet. 18). The charges that were assessed in those three cases, however, bear little similarity to and were of an entirely different character than the fee challenged here. In short the difference in the facts renders those cases inapposite.

Two of the cases, *American Trucking Ass'ns v Secretary of Administration,* 613 NE2d 95 (Mass 1993) and *American Trucking Ass'ns v Secretary of State,* 595 A2d 1014 (Me 1991), involved an annual per truck charge for every truck that transported hazardous waste on highways in the respective states of Massachusetts and Maine.

The charge was assessed against all trucks hauling hazardous waste, regardless of whether the hazardous waste was being transported interstate or intrastate. Thus, it was readily apparent that the states of Massachusetts and Maine were levying a charge to engage in interstate commerce within the boundaries of their states. That is not the case here. The challenged fee in the present case in no way levies a charge on motor carriers to engage in interstate commerce on the highways in Michigan.

Similarly, the third case cited by the Petitioners, *Government Suppliers Consolidating Sers Inc v Bayh,* 975 F2d 1267 (7th Cir, 1992), directly levied a charge on engaging in interstate commerce within the State of Indiana. There, Indiana had enacted legislation that provided, "not only for fees that apply uniformly to all waste, regardless of origin, but also for fees that apply only to waste generated outside Indiana." *Id.* at 1271. Thus, the Indiana statute evidenced a clear discriminatory purpose, i.e. to discourage or prevent the hauling of solid waste into Indiana. Unlike the Indiana fee the Michigan fee challenged

by the petitioners neither varies in amount nor does it evidence a discriminatory purpose.

In light of the foregoing, it is clear that the conflict alleged by the Petitioners does not warrant this Court's review.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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Dated: April, 2004

APPENDIX

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

DOCKET NO. 95-15628-CM

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION, et al,

OPINION

Defendants.

TROY CAB, INC., et al,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

DOCKET NO. 95-15631-CM

-vs-

STATE OF MICHIGAN, et al.,

OPINION

Defendants.

Before the Court in these consolidated class actions are three motions for partial summary disposition brought by Plaintiffs and Intervening Plaintiffs. All Plaintiffs collectively challenge the constitutionality and lawfulness of certain fees imposed on the trucking industry by Michigan statutes as administered by the Public Service Commission. The constitutional challenges are brought under both the federal and state constitutions, although those brought under Michigan fundamental law and not the subject of these motions. The nonconstitutional claims are predicated on federal statute and assert that the challenged fees violate such supreme law and thus must be enjoined.

The fees here challenged are mandated by Michigan's Motor Carrier Act (MCA or Act), 1933 PA 254 as amended, MCL 475.1, et seq; MSA 22.531, et seq. They are three in number and are delineated in two sections of article IV of the Act.

First there is the intrastate authority fee of $100.00 required when submitting to the Public Service Commission (PSC or Commission) or application for a certificate of authority or a permit, whether granted or not. that application fee is authorized by article IV, section 1 of the Act, MCL 478.1; MSA 22.560.

Second, section 2 of article IV, MCL 478.2; MSA 22.561, mandates annual fees of $100.00 for each motor vehicle operated by a motor carrier. Subsection (1) applies that requirement "for the administration of this act" to each vehicle used in intrastate service. Subsection (2) makes the same requirement applicable to each vehicle "registered in this state and operating entirely in interstate commerce" by a "motor carrier licensed in this state."

According to Plaintiffs, all three fees are unlawful because they, and especially the intrastate vehicle fee

authorized by section 2(1), have been preempted by federal law. Further, they assert that the section 2(2) fee on each Michigan-registered vehicle operated entirely in interstate commerce by a Michigan-licensed motor carrier contravenes another provision of federal law that created the Single State Registration System for motor carriers in interstate commerce. Finally, they complain also that the section 2(1) fee imposed on vehicles operated in intrastate service offends the dormant Commerce Clause of the United States Constitution by discriminating against foreign motor carriers operating substantially in interstate commerce. The Court will treat each claim in order, beginning with that on which Plaintiffs primarily rely.

FEDERAL PREEMPTION

Federal preemption has its origin in the Supremacy Clause of the US Const, art VI, which declares that the laws of the United States "shall be the supreme Law of the Land." However, federal provisions that invalidate state law must be narrowly tailored to support a presumption against preemption of state law. Ryan v Brunswick Corp, 454 Mich 20, 27; 557 NW2d 541 (1997). State police powers are not superseded by federal provisions unless that is the clear and unequivocal intent of Congress. Id. This is especially true of state regulation of matters relating to health and safety. Id. The plain meaning of federal provisions must be given effect unless there is reason to think Congress intended a more restrictive reading. Id, p 28. Courts must seek the congressional intent from the text, structure and purpose of the federal provision as a whole. Id. Such considerations include "'the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" Id, quoting Medtronic, Inc v Lohr, 518 US ___; 116 S Ct 2240; 2251; 135 L Ed 2d 700 (1996).

The Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305, contains § 601, which added

subsection (h), "Preemption of State economic regulation of motor carriers," to 49 USC 11501, subsequently recodified as 49 USC 14501.[1] By virtue of § 601, effective January 1, 1995, the FAAAA preempts state economic regulation of motor carriers by providing that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier. . . or any motor private carrier with respect to the transportation of property." 49 USC 11501(h)(1), now recodified as 49 USC 14501(c)(1). Such language clearly and expressly prohibits a state from enacting or enforcing laws related to economic aspects of the service provided by a motor carrier. See Fitzpatrick v Simmons Airlines, Inc, 218 Mich App 689, 691; 555 NW2d 479 (1996). The question then becomes whether Michigan's MCA is a law related to the price, route or service of a motor carrier. Id.

In Morales v Trans World Airlines, Inc, 504 US 374, 383; 112 S Ct 2031; 119 L Ed 2d 157 (1992), the United States Supreme Court concluded that, as used in a similar statute respecting the service of air carriers, the phrase "relating to" expressed a broad preemptive congressional purpose. See In Re Federal Preemption of Provisions of the Motor Carrier Act, 223 Mich App 288, 300-301; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998); Fitzpatrick, supra. Morales, p 384, determined that state laws have a "connection with" or "reference to" airline services were "related to" the federal act for purposes of preemption. See Fitzpatrick, p 692. Indeed, Morales, p 384, rejected the view that the federal act's preemptive scope is limited to state laws specifically addressed to the air carrier industry, ruling instead that a state law may be preempted even if it is not designed to affect the area of

[1] The entirety of this preemption provision is quoted in In Re Federal Preemption of Provisions of the Motor Carrier Act, 223 Mich App 288, 293-294; 566 NW2d 299 (1977), lv den 458 Mich 852 (1998).

preemption or its effect on that area is only indirect.[2] Morales held, p 391, that a state law requiring truth-in-advertising of air fares was related to the price and service of carriers and was therefore preempted by the federal act. Accord American Airlines, Inc v Wolens, 513 US 219; 115 S Ct 817; 130 L Ed 2d 715, 724-725 (1995): state consumer fraud law is preempted where applied to rates and services of airline frequent-flyer programs. Thus, the Fitzpatrick court held, supra, that fidelity to the broad interpretation rendered by the United States Supreme Court in Morales required the conclusion that judicial enforcement of the Michigan Civil Rights Act to protect against employment discrimination in the air carrier industry was likewise preempted.[3]

If federal legislation preempts some applications of the Michigan Civil Rights Act to the employment practices of air carriers in this state, as ruled in Fitzpatrick, then a fortiori the same preemptive effect of the FAAAA must apply to any economic regulation imposed on motor carriers by the MCA.[4]

[2] On the other hand, Morales, p 390, left room for state actions "too tenuous, remote, or peripheral" to have preemptive effect -- without, however, explaining what was meant by those terms of qualification or how they should be applied to "a border-line question." Rather, Morales said only that "we express no views about where it would be appropriate to draw the line." Id, quoting Shaw v Delta Air Lines, Inc, 463 US 85, 100 n 21; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

[3] That ruling was recently limited by Gilman v Northwest Airlines, Inc, 230 Mich App 293, 303-304; ___ NW2d ___ (1998), which held that the same federal statute does not preempt the Michigan Civil Rights Act prohibitions of age and sex discrimination because those employee characteristics have no apparent connection or relation to an airline's routes, prices or services. Gilman, at 298-300, distinguished Fitzpatrick, supra, which had dealt only with height and weight discrimination in employment.

[4] The PSC acknowledges such preemptive effect on specific provisions of the MCA and has ceased to enforce those sections it considers preempted. Thus, the PSC no longer requires applicants for certificates of authority to present evidence that their proposed service will serve a required public purpose without creating excess service. It no longer mandates that carriers avoid predatory pricing practices or file tariff schedules. Similarly, it no longer exercises its authority under the MCA to determine reasonable and

Thus, the question is whether the Michigan requirements challenged here, viz., the fees authorized by art IV, §§ 1 & 2 of the MCA, are manifestations of economic regulation. If so, they are preempted. If not, they may still be preempted if related, no matter how indirectly, to the price, route or service of a motor carrier. See Morales, supra, p 386. However, where such indirect relationship is "too tenuous, remote, or peripheral" to implicate preemption, the state legislation may be permitted to stand unaffected by the national policy of economic deregulation. Id, p 390.

While the tenuousness of peripherality of an "indirect relationship" has not been expressly addressed, there are some indications that it need not be particularly remote from the preempted field. For instance, in American Airlines v Wolens, supra, 130 L Ed 2d at 726 n 5, the United States Supreme Court endorsed the view that "the ban on enacting or enforcing any [state] law 'relating to rates, routes, or services' is most sensibly read, in light of the [federal law's] overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operation of an air carrier.'" That view was prefigured in Morales, supra, p 378, which recognized that the federal law was designed to place "maximum reliance on competitive market forces" under a uniform national regime of economic deregulation, i.e., "[t]o ensure that the States would not undo federal deregulation with regulation of their own." Thus, that federal enactment, as American Airlines stated at 728, "stops States from imposing their own substantive standards with respect to rates, routes, or services." That would suggest that the fees challenged here are not preempted by § 601 since they impose on motor carriers no particular "substantive standards" of competition or regulation.

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sufficient rates, fares, charges and classifications or to penalize unlawful discrimination. See In re Federal Preemption, supra, p 297.

The Commission's determinations regarding the effect of § 601 on the MCA were summarized recently in In re Federal Preemption, supra, p 295:

> "The PSC concluded that § 601 preempts only regulatory provisions concerning price, routes, and service -- the essence of economic regulation. The PSC found it had substantial residual regulatory authority, including regulatory authority over matters such as safety. The PSC further concluded that it should continue a certification process (albeit, a 'streamlined' certification process) for intrastate motor carriers and that it could and should continue to assess statutorily mandated fees. ... Since issuing its decisions, the PSC has ceased enforcing those provisions of the Motor Carrier Act that it concluded had been preempted."

Thus federal preemption under § 601 and the Commission's decisions applying that federal principle to the MCA have substantially altered the regulatory framework for the trucking industry in Michigan. Id, p 298.

Even so, the court in In re Federal Preemption, p 301, ruled that much of the MCA survives the federal preemption statute:

> "[I]t is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a statute is clear and unambiguous, the plain meaning of the

> statute reflects the legislative intend. ... Furthermore, the House Conference Report indicates that 'economic regulation' is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103d Cong, 2d Sess, pp 84-85. ... The argument that Congress intended to preempt the entire field of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation."

See also Michigan Trucking Ass'n v Public Service Comm (On Remand), 225 Mich App 424, 427-429; 571 NW2d 734 (1997).

Significantly, the Federal Preemption court, pp 302-303, also rejected the contention reiterated by Plaintiffs here that federal preemption of all economic regulation means that the fees assessed under the MCA to finance that regulation must likewise be preempted, especially since the primary focus of the MCA had traditionally been economic regulation of the trucking industry:

> "Section 601 did not preempt the entire Motor Carrier Act. Section 601 of the FAAAA does not in its words indicate an intent to preempt fee provisions such as those challenged by these appellants. The legislative history reflects a contrary intent. The House Conference Report states that nothing in the legislation is intended to change the application of state tax laws to motor carriers. H R Conf Rep No 677, supra, p 85.
>
> "The PSC still has significant regulatory obligations. For example, the PSC must

> supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants ... have not shown that the cost of the PSC's operations has ever been totally funded by the fees its [sic] collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation."

The Court of Appeals has spoken. In two published decisions, Federal Preemption and Michigan Trucking Ass'n, supra, it has ruled that § 601 did not preempt the MCA in its entirety, and least of all in matters of safety regulation and the application and vehicle fees challenged here. That must be this Court's judgment as well. In short, Plaintiffs' motion based on the federal preemption claim must be denied.

SINGLE STATE REGISTRATION SYSTEM

Congress has provided for a Single State Registration System (SSRS) that requires a motor carrier having interstate authority to register annually with only one of the states among those it is authorized to provide transportation service. Under 49 USC 11506, the SSRS is deemed to satisfy the registration requirements of all other states, except for a nominal fee "not to exceed $10 per vehicle" that is permitted annually to each participating state. The same section prohibits as an

unreasonable burden on interstate commerce any other fee not in accordance with that specifically authorized.

Plaintiffs complain that the MCA violates the SSRS by its art IV, § 2(2) requirement of a $100.00 annual fee per vehicle that is registered in Michigan and operated entirely in interstate commerce by a Michigan-licensed motor carrier. Alternatively, they contend that § 2(2) is effectively preempted by the SSRS mandate that no participating state, other than the registering state, exact more than an annual fee of $10.00 per vehicle operated in interstate commerce. In either case, this MCA vehicle fee is supposedly rendered a nullity by the SSRS.

Of course, Michigan's MCA "applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12; MSA 22.545." Federal Preemption, supra, p 294. Here, however, there is no inconsistency. Section 2(2) of article IV of the MCA applies only to vehicles registered in Michigan by Michigan-licensed motor carriers, i.e., where Michigan is the "registering state." The SSRS fee system places a $10.00 annual vehicle fee limit on only the "participating states," however, not on the "registering state." The SSRS neither prohibits nor preempts the Act's § 2(2) vehicle fee.

Moreover, the MCA expressly accommodates the fee system mandated by the SSRS. In article IV, section 7, MCL 478.7; MSA 22.566, the Act provides for the registration of and fees paid by carriers engaged in interstate transportation pursuant to the SSRS and any other reciprocal multistate agreement. In particular, subsection (4) mandates that "[t]he annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00." Obviously, that is perfectly consistent with the annual $10.00 vehicle fee permitted each participating state by the SSRS. Plaintiffs' motion must therefore be denied.

COMMERCE CLAUSE

The dormant Commerce Clause of US Const, art I, § 8, prohibits a state from erecting barriers to the national regime of free trade by enacting tax or fee requirements that constitute an undue burden on or discrimination against interstate commerce. Plaintiffs assert that the MCA art IV, § 2(1) vehicle fee for intrastate Michigan transportation impermissibly discriminates against interstate motor carriers by favoring domestic carriers whose business is exclusively intrastate. This is supposed to be so essentially because domestic intrastate carriers necessarily derive a disproportionately greater financial advantage for their § 2(1) fees than do those interstate carriers that may want to make an occasional intrastate haul while their vehicles are visiting Michigan. The Court is not persuaded that the choice of whether to engage primarily in interstate rather than exclusively in intrastate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns. And it surely cannot result in the invalidation of § 2(1) on Commerce Clause grounds.

Plaintiffs cite American Trucking Ass'ns v Scheiner, 483 US 266, 282; 107 S Ct 2829; 97 L Ed 2d 226 (1987), for its condemnation of "flat taxes" whose unapportioned measure results in discrimination against some participants in interstate commerce in a manner that contradicts the purpose of the Commerce Clause. As Goldberg v Sweet, 488 US 252, 266; 109 S Ct 582; 102 L Ed 2d 607 (1989), explained, "In Scheiner, we held that Pennsylvania's flat taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways." Here, the MCA intrastate vehicle fee is alleged to be just such a "flat tax" and therefore impermissibe [sic] under the principles enunciated in Scheiner. Plaintiffs' reliance on Scheiner is misplaced.

First, the taxes at issue in that case were exacted for the purpose of financing roadway upkeep based on highway usage, but the flat tax on the privilege of operating on the state roads failed to take into account varying degrees of such usage by the different carriers. Here, however, the fee exacted is regulatory and intended "for administering the act." Federal Preemption, supra, p 302. Such state regulation as remains after federal preemption, including regulation of vehicular size and weight, insurance requirements and safety standards, is not amenable to a fee structure based on apportionment by usage rates. And the fee itself is plainly not a tax on the privilege of doing business in Michigan.[5] Thus, Commerce Clause interests are not affected by the intrastate vehicle fee.

Second, the flat taxes in Scheiner applied across the board to any vehicle traveling the state's highways, whereas the fee here is exacted only of those vehicles, foreign or domestic, that the carrier chooses to operate in point-to-point intrastate Michigan service. The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate service comply with MCA safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause.

Third, Scheiner itself provides ample reason to think its principles are inapplicable to the intrastate vehicle fee of the MCA. There the Court found dispositive its precedents holding "that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that

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[5] It might also be pointed out that there is a distinction between a tax and a fee, although the Scheiner Court did not adhere to it. Neither did the Court of Appeals in Federal Preemption, supra at 302, quoted above in context, which spoke of the MCA fees as if they were nothing different from "the application of state tax laws to motor carriers." (Emphasis added.)

compete in an interstate market than it imposes on its own residents who also engage in commerce among States." Id, p 282 (footnote deleted). Stated more plainly, this principle applies only where foreign and domestic carriers are all competing in interstate commerce. Thus, Michigan cannot, consistent with the Commerce Clause, tax foreign carriers more heavily than domestic carriers engaged in interstate competition. It can, however, impose the identical vehicle fee of $100.00, as authorized by § 2(1), on all carriers that opt to provide intrastate Michigan transportation services. That fee does not implicate Commerce Clause concerns.

In short, the fee burden here does not fall more heavily on foreign carriers than on Michigan carriers engaged in interstate commerce. It is, rather, the same for all carriers that choose to provide intrastate Michigan haulage services either exclusively or in addition to interstate operations. As was said in Scheiner, p 283, "the Commerce Clause is not offended when state boundaries are economically irrelevant." That is surely true of the § 2(1) intrastate vehicle fee based on Michigan boundaries, which have no economic relevance for interstate traffic. The motion challenging that fee on Commerce Clause grounds must therefore be denied.

The Court determines that Plaintiffs' motions for partial summary disposition are meritless. All three motions must therefore be denied. An order consistent with this option may enter upon its proper presentation.

JAMES R. GIDDINGS
Circuit Judge

DATED: Oct. 13, 1998

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.

_____/

TROY CAB, INC., et al,

Plaintiffs,

v

File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.

_____/

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AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. Affiant is the Director of the Motor Carrier Regulation Division of the Public Service Commission, Michigan Department of Commerce, and has held this position for approximately nine years.

MOTOR CARRIER ACT

2. The Motor Carrier Regulation Division (MCRD) is responsible for assisting the Commission in the administration of the Michigan Motor Carrier Act, 1933 PA 254, as amended, MCL 475.1, et seq, the title to which begins as follows:

> "AN ACT to promote safety upon and conserve the use of public highways of the state; …..". (Emphasis added).

3. The titled purpose of promoting safety upon and conserving the use of public highways is restated in the purpose and policy section of the Act, MCL 475.2, which in pertinent part states as follows:

> "It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: ... (b) protect and conserve the highways and protect the safety and welfare of the travelling and shipping public in their use of the highways; ...." (emphasis added)

4. The motor carrier transportation industry provides a public service, but also increases the risk of harm to the traveling public and damage to the public highways. The transportation by motor vehicle for hire is a commercial enterprise for profit which utilizes the public highways in conjunction with the travelling public. Since motor vehicles for-hire increase the risk of harm to those using the highways as well as the cost of maintaining those highways, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the

public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes.

5. The title to the Motor Carrier Act provides for the collection of fees and taxes from motor carriers to promote the highway safety and conservation purposes of the Motor Carrier Act as follows:

> "... To provide for the levy and collection of certain privilege fees and taxes for such carriers for such purposes and the disposition of such fees and taxes; ...". (Emphasis added).

6. The Motor Carrier Act, also provides for the regulation of price, route and service of motor carriers for-hire. The title of the act in pertinent part states as follows:

> "... to give the Commission jurisdiction and authority to fix, alter, regulate and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the Commission of rates, fares and charges of contract carriers and to authorize the Commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; ..."

7. The regulation relating to price, route and service are also provided for in the purpose and policy section of the act, MCL 475.2 which in pertinent part states as follows:

> "(d) Meet the needs of motor carriers, shippers, or receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow

the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; ... (i) prevent unjust discrimination; ... (k) provide and maintain service to small communities and small shippers; ... (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; ..."

The Motor Carrier Act was also designed to stabilize the industry by limiting entry and regulating rates, routes and services so as to assure quality transportation services to the public, and promote safety upon and conservation of the public highways. Since January 1, 1995 the Motor Carrier Division of the Michigan Public Service Commission has not enforced any of the laws or regulations relating to the price, route or service of a motor carrier.

8. A partial legislative history of Michigan motor carrier regulation includes the following significant events:

a. 1933 Passage of P.A. 254, Michigan Motor Carrier Act

b. 1963 Passage of P.A. 181 Motor Carrier Safety Act, jurisdiction assigned to the Public Service Commission. No funding provided.

c. 1966 PA 162 amends Motor Carrier Act to repeal levy of weight-distance tax on motor carriers, substitutes per vehicle annual fee of $50.00 and application fee of $20.00

d. 1982 PA 354 amends the Motor Carrier Act. Partial deregulation, collective ratemaking authorized, fee increases to improve regulation and

enforcement:

application fee	$20 to $100
annual decal fee	$50 to $100

e. 1982 Executive Order 1982-1 transfers jurisdiction of Motor Carrier Safety Act and the PSC enforcement division to the State Police. Funding continues to be provided from PSC generated motor carrier fees.

f. 1988 PA 347 requires interstate motor carriers to register ICC authority and pay $10 per vehicle fee. To be effective 1/1/90.

g. 1991 Public Law 102-240 "Intermodal Surface Transportation Efficiency Act of 1991" mandates state participation in the "Single State Registration System" to be effective 1/1/94.

h. 1993 PA 352 amends to Motor Carrier Act to further deregulate; requires PSC to develop a safety rating system.

i. 1994 Public Law 103-305 "Federal Aviation Administration Authorization Act of 1994." Sec 601 preempts certain state and local authority for economic regulation of motor carriers.

INTERSTATE VERSUS INTRASTATE COMMERCE

9. Regulation of the motor carrier industry in this nation has traditionally involved a dual system of federal and state regulation. The Interstate Commerce Commission regulates interstate motor carrier transportation while state regulation of intrastate commerce has been preserved. Pursuant to 49 USC § 10521 (**Exhibit A**) the general

jurisdiction of the Interstate Commerce Commission over transportation by motor carriers is defined, and thus leaves the states to regulate intrastate operations involving a pickup and delivery of property in the same state without a prior or subsequent movement through another state.

10. Historically, the Interstate Commerce Commission has regulated motor carriers operating in interstate commerce in a similar fashion to the way the Michigan Public Service Commission has regulated motor carriers operating in intrastate commerce. Certificates of authority to conduct operations, together with tariffs covering rates, routes and services have been provided by the ICC for interstate operations and the MPSC for intrastate operations. The Michigan Motor Carrier Act requires interstate carriers to comply with the Michigan Motor Carrier Act, except to the extent the Act is inconsistent with or contravenes federal law. See MCL 476.12, MCL 477.10 and MCL 478.7. The MPSC regulates the for-hire transportation of property by motor carriers which move wholly within the state (intrastate). If the property to be transported is to be moved by the owner of the property in motor vehicles owned or leased by the owner of the property, then the movement is private carriage, not regulated by the MPSC or the ICC. Otherwise, the for-hire transportation of property intrastate requires a motor carrier to obtain MPSC operating authority.

11. According to the 1993-1994 NARUC compilation of transportation regulatory policy (**Exhibit B**) 45 states and U.S. Territories have some form of regulation of common carriers. The vast majority of these states and territories also regulate insurance (45 states), safety (33 states) as well as the registration of interstate carriers (37 states). Thirty-nine states (39) also assess a fee for intrastate registration of motor carrier operations. Thirty-two (32) states or territories (32) utilize an identification device for vehicles such as a decal or stamp. A few states also regulate private carriers.

MOTOR CARRIER FEE SYSTEM

12. Article 4 of the Michigan Motor Carrier Act, MCL 478.1 through MCL 478.8 provides for the collection of certain fees referred to in the title of the Act to carry out the Act's purposes. Of all the motor carrier fees collected, approximately half go to the Department of State Police for safety enforcement of the motor carrier industry. The remainder is used by the MPSC and the Michigan Department of Commerce for the administration of the Motor Carrier Act which includes enforcement of safety, financial fitness and insurance requirements for motor carriers.

13. The intrastate authority application fee at MCL 478.1 is paid by an applicant for an intrastate MPSC certificate. An interstate motor carrier would not pay this fee. The fee is $100 for the original application and $50.00 for the annual renewal. This fee amount has remained the same since 1982. Prior to the 1982 amendments to the act, the application fee was $20.00 and the renewal fee $10.00. The application process involves several steps including checking the completeness of the application, performing a safety review of the applicant, publishing a notice of the application in the bulletin, and preparing a file for Commission consideration. In the event of a protest, a hearing is also scheduled. Prior to January 1, 1995, oral testimony or written affidavits were also required regarding the public need for the services. The renewal requires a vehicle update and proof of insurance along with payment of fees. The intrastate application fees and renewal fees generate approximately $200,000 per year in revenue which is merged with other motor carrier fee revenues and appropriated to the Public Service Commission, Department of Commerce and Michigan State Police. Any unexpended balances are deposited in the Michigan Transportation Fund at the end of the fiscal year. In fiscal year 1993-94, the PSC collected $224,000 in PSC application fees.

14. A motor carrier obtaining intrastate authority must also determine the vehicles which it will assign to intrastate transportation. A list of the equipment providing intrastate services is furnished with the original application or renewal application. An example of such a listing is attached as **Exhibit E**. A carrier also pays the $100 annual fee relating to his intrastate authority for each vehicle pursuant to MCL 478.2(1). The carrier itself selects which self-propelled power units and how many units, relate to provision of intrastate authority and makes the requisite payment relating to said vehicles. The MPSC Staff does not determine how many units, or which units, are used for intrastate authority. This is a matter solely determined by each carrier a good faith basis, without review by the MPSC Staff. Each carrier makes a determination concerning what portion of their vehicle fleet should be apportioned or allocable to Michigan intrastate authority based upon his own operations, business determinations, and factors which are relevant to his own business circumstances or situation. Neither the MPSC Staff nor the MPSC have undertaken any complaint or other enforcement action relating to second guessing or challenging the vehicle fees paid by a carrier utilizing each carrier's own judgment as to the portion of its fleet to be used for intrastate operations in Michigan based upon its own business circumstances.

15. The intrastate annual vehicle decal fee found at MCL 478.2(1) is paid after an intrastate motor carrier has obtained an MPSC motor carrier certificate. Before the carrier commences operations under its certificate, it must purchase a decal for each power unit at a fee of $100 each. This decal identifies that the carrier has paid its fee and is affixed to the door of the vehicle. A six-month decal is also available after July 1 for $50.00. Each calendar year the decals must be replaced. A household goods carrier only pays a $50.00 annual fee. These fees have remained the same since 1982. Prior to that time the fee was $50.00 except for household goods carriers which paid $20.00. Prior to 1966, the Commission

collected a weight/distance tax rather than a per vehicle fee. This fee, MCL 478.2(1), is the largest source of revenue for the Public Service Commission motor carrier regulation functions and also supports the State Police Motor Carrier Division, which until 1982 was part of the PSC. These fees support State Police enforcement of the Motor Carrier Act, Motor Carrier Safety Act, size and weight limitations, enforcement of the Vehicle Code and other laws governing commercial motor vehicles and motor carriers. In calendar year 1994, the PSC collected approximately $2,905,000 in intrastate vehicle decal fees.

16. The interstate annual vehicle decal fee found at MCL 478.2(2) is paid by an interstate motor carrier only on vehicles registered and plated through the Michigan Secretary of State. The Commission has always interpreted vehicles "registered in this state" as meaning registered and license plated with the Secretary of State. An interstate carrier which registers its vehicles in any other state or province does not pay this fee. The fee is $100.00 per calendar year per vehicle or $50.00 after July 1. A decal identical to the intrastate decal is issued and affixed to the door of the vehicle. This fee has remained the same since 1982. It was $50.00 from 1966 to 1982. These fees amounted to approximately $751,000 in 1994. The revenue from these fees is combined with other motor carrier fee revenue and appropriated by the Legislature for expenditure by the PSC and the State Police Motor Carrier Division. These fees support enforcement of the Motor Carrier Act, Motor Carrier Safety Act, Michigan Vehicle Code, size and weight regulation, and other laws governing commercial vehicles and motor carriers. Since 1966, the fees paid by intrastate PSC regulated motor carriers and interstate motor carriers commercially registered in Michigan have been identical. The fees levied on interstate motor carrier vehicles commercially registered in other states are covered by MCL 478.7 and are a maximum of $10.00. For fiscal year 1993-1994 the Commission collected $2,235,000 pursuant to MCL 478.7(4).

17. The federal single state system of registration, providing for a $10 fee for registering federal authority in each state, is established under the federal sphere of regulation of interstate transportation under the Interstate Commerce Act of 1980 as amended, as the exercise of the federal portion of jurisdiction under the dual nature of state/federal regulation of motor carrier transportation. The separate intrastate fees collected by Michigan and most other states relate to intrastate transportation and the exercise of the states powers relative to the state portion of the dual federal-state jurisdictional system. The intrastate fees collected by the state should not be confused with the single state registration system adopted for the separate federal system.

18. The annual renewal fee collections (478.1) as well as the various annual vehicle fees collections (478.2(1), 478.2(2) and 478.7) for the plaintiffs as well as a sample of large motor carriers that operate in Michigan for the years 1993, 1994 and 1995 are attached as **Exhibit C**. This data demonstrates the diversity of types and amounts of fees paid by the plaintiffs and others. The motor carriers make various business decisions that impact the amount of fees. These decisions involve the location of the principal place of business, the state in which the carrier chooses to register its vehicles and whether or not the carrier has obtained an intrastate certificate.

19. The Legislature expected that motor carriers with a close nexus to Michigan (vehicles operating in intrastate commerce with MPSC authority or vehicles plated in Michigan) would pay fees for the administration of the Motor Carrier Act, the purposes of which are to promote safety, conserve highways and economically regulate the industry. Michigan motor carrier fees under MCL 478.1 and MCL 478.2 are not paid by motor carriers engaged in interstate commerce on vehicles plated in another state. The rationale for charging interstate vehicles plated in Michigan a fee, under MCL 478.2(2), and not charging interstate vehicles plated in another

state is a fee that vehicles which are license plated in Michigan are based in Michigan, and therefore have a greater utilization of the highways and services in Michigan than do vehicles plated in another state. Different states collect various fees and taxes from motor carriers in different combinations and in significantly different amounts. See **Exhibit B** for a chart which shows fuel taxes, truck and trailer registration and other fees (including motor carrier fees such as Michigan's decal fees). Many of these fees apply to both intrastate and interstate motor carriers and motor vehicles.

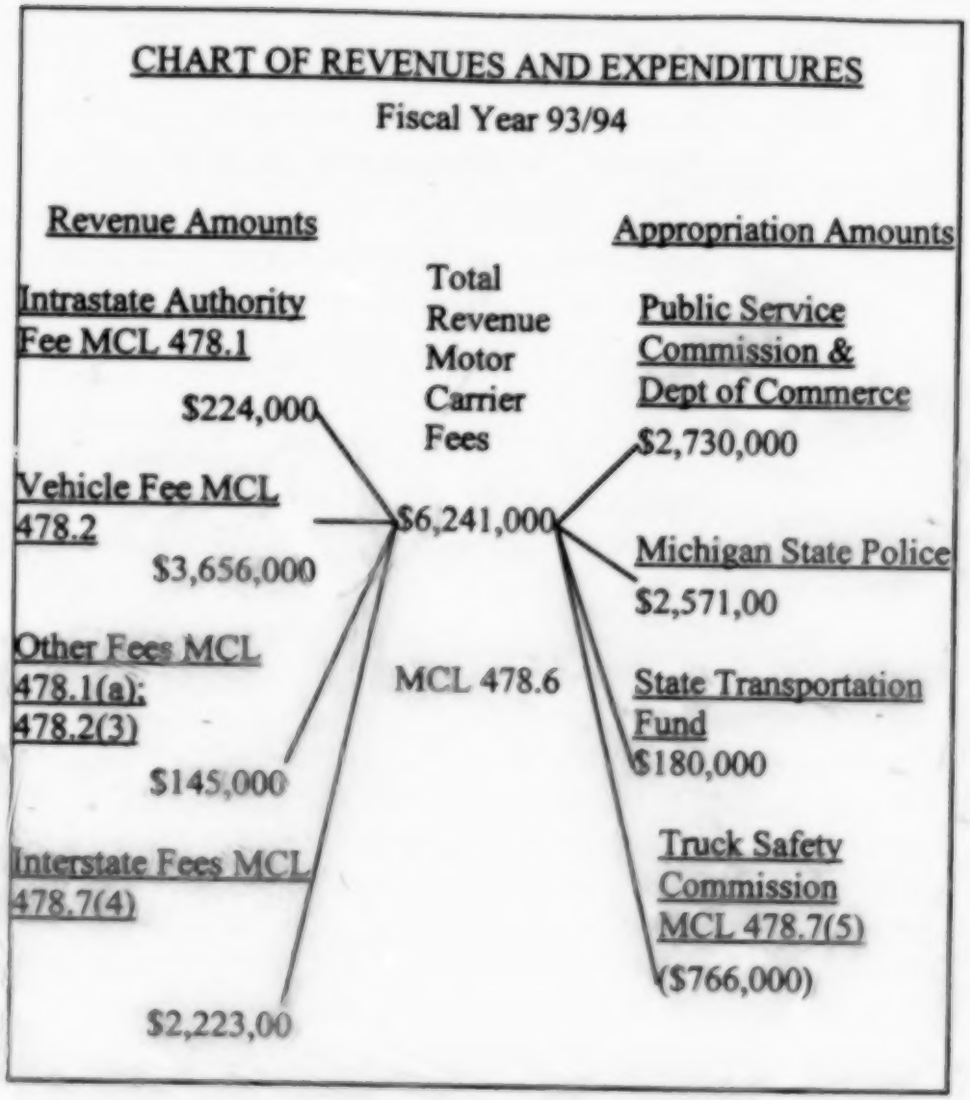
SINGLE STATE REGISTRATION

20. The Single State Registration system, to which the $10 fee applies, relates to filing of interstate ICC authority and proof of insurance with each state for each vehicle operating in interstate commerce to enable states to enforce ICC requirements. It does not relate to the state registration requirements for registration, authorities, license plates, etc. which may be applicable to intrastate operations or those interstate vehicles or operations having a close nexus to the state. The ICC has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on the states for this purpose under the SSRS system. Congress allows the states to require motor carriers operating with interstate authority to register their ICC certificate or permit before commencing operations within that state and has specifically found that such registration is not an unreasonable burden on transportation when registration is completed under the standards of the single-state-registration system found at 49 USC § 11506. Under the single state registration system, an interstate motor carrier is required to register annually with only one state by filing its ICC certificate or permit and proof of insurance along with the payment of a fee for each participating state not to exceed $10.00 per vehicle which the motor carrier admits will operate in each participating state.

21. Michigan is a participating state in the single state registration system and pursuant to the Michigan Motor Carrier Act, MCL 478.7(4), levies an annual fee of $10.00 or less on each interstate motor carrier vehicle operated in Michigan. In the fiscal year 1993 to 1994 Michigan collected approximately $2,223,000 in interstate registration fees under MCL 478.7(4) and consistent with the requirements of MCL 478.7(5), $766,000 of those fees collected were deposited with the Truck Safety Fund and utilized for safety education programs for motor carriers and Michigan State Police safety and enforcement purposes.

REVENUE COLLECTED FROM MOTOR CARRIER FEES

22. The following chart shows revenue collected and expenses for fiscal year 1993-1994 for motor carrier fee under the Michigan Motor Carrier Act, 1933 PA 254:



As is evident from the above chart, the total amount of regulatory fees collected under the Motor Carrier Act are closely matched to the State of Michigan's cost of regulating motor carriers to carry out the purpose of the Act.

APPROPRIATIONS FOR SAFETY

23. The safety purposes of the Michigan Motor Carrier Act, 1933 PA 254, are carried out in part by the PSC which administers the following safety functions:

a. A MPSC certificate is issued to a motor carrier only after a safety review consistent with requirements set by the Commission in Order T-1281.

b. A certificate may be revoked or suspended for unsafe operations.

c. Regulatory compliance with state and federal vehicle and driver regulations through the certificate process.

d. Regulatory compliance with insurance coverage requirements.

24. Prior to 1982, the Michigan Public Service Commission utilized its own enforcement division to carry out safety inspections, traffic enforcement, safety audits and the operation of scale sites for motor carriers. In 1982, Governor Milliken transferred by Executive Order 1982-1, the PSC Enforcement Division to the Department of State Police along with the responsibility and funding for enforcement of the Motor Carrier Safety Act, 1963 PA 181. Under the Motor Carrier Safety Act, the Motor Carrier Division of the State Police is responsible for the following safety functions:

a. Vehicle requirements such as brakes, load securement, inspections, etc. are specified and enforced.

b. Driver requirements such as hours of service, licensing, medical certificates, etc. are specified and enforced.

c. Drug and alcohol testing requirements are enforced.

d. Safety inspections and audits are conducted.

e. Regulates movement of hazardous materials.

25. Approximately half of all Michigan motor carriers fees collected are appropriated by the Legislature to the Motor Carrier Division of the Department of State Police for safety enforcement and inspections of motor carrier vehicles. Title XII of Public Law 99-570, 49 CFR Federal Motor Carrier Safety Regulations are administered by the Federal Highway Administration of the U.S. Department of Transportation. Through agreements with the State of Michigan, the Motor Carrier Division of the State Police also enforces the federal requirements which in pertinent part include the following:

a. Requires uniform commercial drivers license.

b. Specifies vehicle and driver requirements.

c. Establishes drug and alcohol testing requirements.

d. Specifies accident reporting requirements.

e. Regulates transportation of hazardous materials.

f. Establishes a motor carrier safety rating system.

PREEMPTION OF PRICES, ROUTES AND SERVICE

26. On August 23, 1994, President Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), amending Title 49 USC § 11501, which took effect on January 1, 1995.

27. On September 8, 1994, the Michigan Public Service Commission, in direct response to the enactment of 49 USC § 11501(h) issued an "Order and Notice of Hearing Commencing Contested Case Proceedings for An Order Regarding Federal Preemption of State Motor Carrier Regulation", to examine the effect of 49 USC § 11501(h) on the Michigan Motor Carrier Act and Rules. The proceeding was conducted as a contested case pursuant to the Administrative Procedures Act of 1969 and the Commission's Rules of Practice and Procedure.

28. In its January 11, 1995 Opinion and Order the Commission recognized that only the Legislature had the authority to revise the Michigan Motor Carrier Act:

> . . . This order is therefore intended solely to provide guidance regarding how the Commission expects intrastate motor carrier regulation to operate in Michigan after January 1, 1995. Thus, interested parties retain the right to request a different interpretation from the Commission, the Courts, and the Legislature regarding the effect of Section 601 on the issues addressed below.

29. The Commission found in its January 11, 1995 Opinion and Order that section 601(h) of the FAAA Act, 49 USC § 11501(h) specifically provides for the preemption of state economic regulation of motor carriers engaged in the intrastate transportation of property to the extent such regulation is related to a price, route, or service.

30. The Commission found in its January 11, 1995 Opinion and Order that Congress limited the preemptive reach of Section 601 under the heading "Matters not Covered" found at 49 USC § 11501(h)(2). There Congress specifically stated as follows:

> (1) – (a) Shall not restrict the safety regulatory authority of a state with respect to motor vehicles, the authority of the state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimal amounts of financial responsibility relating to insurance requirements and self insurance authorization; and (b) does not apply to the transportation of household goods.

31. Pursuant to the Commission's January 11, 1995 Order in MPSC Case T-1273, applications for intrastate authority have been issued for 1995 on a state-wide basis, namely, a motor carrier wishing to perform intrastate service in Michigan makes application for authority for the entire state of Michigan, and pays the requisite application fee. The application then is subject to review for safety, fitness, insurance requirements, and other matters to ensure that the carrier may be authorized to perform services in Michigan. Due to the adoption of Section 601 of the FAAA, effective January 1, 1995, authority is no longer issued relative to any specific rate, route, or service, except for household goods carriers. A copy of the statewide application for intrastate authority is attached as **Exhibit D**. The safety review consists of an analysis of Part II of the Application, Safety Information, as well as any supplemental data that may be requested; U.S.D.O.T. records regarding safety ratings; and Michigan State Police files regarding vehicle inspections, violations found and citations issued. From those materials a safety profile is developed in accordance with the Commission's order in Docket T-1281.

32. Congress also placed beyond the preemptive reach of Section 601, in an optional format, the continuation of certain standard state transportation practices with regard to

uniform cargo liability rules, uniform bills of lading, uniform cargo credit rules and anti-trust immunity for joint line rates or routes, classifications and mileage guides if compliance with state law was no more burdensome than compliance with federal law covering the same subject and if requested by a carrier.

33. In its January 11, 1995 Opinion and Order, the Commission noted that the most important issue to be decided was whether Section 601 preempts the MMCA and rules, either in their entirety or, with respect to only those regulatory provisions concerning price, route and service, and concluded as follows:

> Despite some parties' assertions to the contrary, the wording of [s]ection 601 stops far short of precluding state regulation of all aspects of motor carriage. For example, its heading reads "Preemption of State Economic Regulation of Motor Carriers." This implies that, of the range of areas presently covered by state regulation, economic regulation (rather than regulation of safety, fitness, insurance, etc.) was singled out by Congress for at least partial preemption. Such an implication is further supported by the "General Rule" set forth in [s]ection 601(h)(1), which states only that states "may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service" of any for-hire or private motor carrier. (Emphasis added.) Issues involving prices, routes, and services have long been considered by the motor carrier industry to fall within the definition of economic regulation.
>
> Furthermore, [s]ection 601 lists several exceptions to Congress' preemption of economic regulation. Foremost among these is the statement that [s]ection 601:

> "[S]hall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." [Section 601(h)(2)(A).]
>
> Next, [s]ection 601 states that its preemptive effect "does not apply to the transportation of household goods." [Section 601(h)(2)(B).] Finally, under the heading "State Standard Transportation Practices," [s]ection 601 indicates that it "shall not affect any authority of a State . . . to enact or enforce" a law, rule, or regulation related to uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, or antitrust immunity for joint-line rates or routes, classifications, and mileage guides. [Section 601(h)(3)(A).] However, it further provides that continuing regulatory authority over these standard transportation practices (1) will only arise where the law, rule, or regulation "is no more burdensome" than compliance with federal laws covering the same issue and corresponding regulations issued by either the ICC or the U.S. Secretary of Transportation, and (2) will only apply to a carrier "upon request of such carrier." [Section 601(h)(3)(B).] Therefore, the language of [s]ection 601 reflects that its preemptive effect was not intended to be all-encompassing.

The legislative history of [s]ection 601 supports a similar conclusion. According to the Conference Report, its passage was not designed to preempt all state regulation of motor carriage. Rather, it was intended only to "level the playing field between air carriers on the one hand and motor carriers on the other with respect to economic trucking regulation." (Conference Report, p. 82.) [Emphasis added.] Specifically, Congress sought to eliminate the substantial competitive advantage given to air carriers like Federal Express Corporation over traditional motor carriers like UPS as a result of Federal Express Corp v California Public Utilities Comm, 936 F2d 1075 (CA 9, 1991), cert den ___ US ___ (1992). The drafters' intent to achieve this result while limiting the breadth of [s]ection 601's preemptive effect can be discerned from page 85 of the Conference Report, where it is noted that:

> "New subsection (h)(2) emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected." [Emphasis added.]

The Conference Report goes on to disclose that, in return for an agreement by the American Trucking Association (ATA) to withdraw its opposition to the FAA[A] Act, Congress endeavored to structure [s]ection 601 in a way that would "allow regulatory protection to continue for noneconomic factors, such as

liability rules, antitrust immunity to publish documents, insurance, safety, leasing and cargo credit rules." (Conference Report, p. 88.)

Based on [s]ection 601's wording and legislative history, the Commission concludes that it preempts only those provisions of the [MMCA] and the Rules relating to price, route, and service. In reaching this conclusion, the Commission specifically rejects [Appellant] Central's argument that, because the primary focus of the [MMCA] has always been on economic regulation, no basis exists for continuing state regulation of motor carriage. The Commission reaches this conclusion for two reasons. First, [s]ection 601 does not require that, to avoid preemption, safety regulation must be the primary focus of any state statute regulating motor carriage. Second,. . .safety concerns occupy at least co-equal status with the economic regulation found in the [MMCA]. For example: (1) the first clause of this title states that it is "[a]n act to promote safety upon and conserve the use public highways of the state;" (2) MCL 475.2 proclaims, in pertinent part, that "[i]t is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [C]ommission the power to . . . protect the safety and welfare of the traveling and shipping public in their use of the highways;" and (3) MCL 476.5 requires that, to receive a certificate of authority, a prospective motor carrier must show that it is fit--which is defined as being safe, suitable, and financially responsible--and that its vehicles "may be operated safely upon the public highways."

Similarly, the Commission does not find persuasive [Appellant] Central's claim that, by using the phrase "motor vehicles" instead of "motor carriers" in portions of [s]ection 601(h)(2)(A), Congress intended to strip state regulatory commissions of their power to address safety issues and to limit the oversight of these issues to law enforcement agencies. At the federal level, the definition found at 49 USC 10102(13) shows that the phrase "motor carriers" refers only to common and contract motor carriers. In contrast, by reading 49 USC 10102(17) in conjunction with 49 USC 10102(16) and 49 USC 10102(26), it appears that the phrase "motor vehicles" extends to private motor carriers as well. Congress' use of the broader terms thus likely arose from a recognition that several state commissions regulate private carriers, in addition to common and contract carriers, at least with regard to safety. This fact, when coupled with [s]ection 601's legislative history, supports rejection of [Appellant] Central's claim.

For all of these reasons, the Commission finds that [s]ection 601 preempts only those portions of the [MMCA] and the Rules relating to price, route, and service. [Pages 20-24]

34. In its January 11, 1995 Opinion and Order, the Commission found consistent with the Conference Report to Section 601 that the Commission would continue to issue certificates of authority to motor carriers operating in intrastate commerce based upon the carrier's ability to demonstrate compliance with state law regulating safety, financial fitness and insurance.

35. In its January 11, 1995 Opinion and Order the Commission found that neither the language of Section 601 nor the conference report imply that fees imposed by a state's existing regulatory structure might fall within issues related to price, routes or services, and that continued collection of the fees under MCL 478.2 was not preempted. The Commission attached to its January 11, 1995 Opinion and Order, a copy of the Michigan Motor Carrier Act and Rules showing which sections of the act and rules were preempted by drawing a line through the preempted sections.

EFFECT OF PREEMPTION ON MOTOR CARRIER DIVISION

36. The Motor Carrier Division Staff has used the January 11, 1995 Opinion and Order to guide its activities since January 11, 1995. Even prior to the Commission orders in Case No. T-1273, the Staff had taken steps to implement the federal act. New certificate application forms were developed and placed into use as of 11/15/94 which deleted all consideration of routes and services. All rates and tariffs were determined to be invalid as of 1/1/95 and all rate and tariff filings after that date were returned. Applications for certificates of authority continue to be reviewed to determine if the applicant has a satisfactory safety rating or other evidence that the carrier could or would operate safely. Insurance certification continues to be required and continuous coverage monitored. Household goods carriers continue to be regulated as to authority, rates and consumer protection. The 1995 certificate and decal renewal process was performed as required by the statute and the Commission orders in Case No. T-1273. Further, the 1995 Single State Registration Renewal process for interstate motor carriers was continued.

37. The Motor Carrier Division works to promote safety upon the highways and to assure motor carrier fitness and compliance with existing state laws, regulations and orders of the Commission. The Safety and Compliance Section of the

Motor Carrier Division works with the Motor Carrier Division of the Department of State Police to assure safe operations by motor carriers and ensure compliance with applicable laws. The Safety and Compliance Section is required to conduct review of applications for authority as mandated by the Commission's January 11, 1995 order implementing safety rating system, T-1281, which was issued in response to 1993 legislative amendments to the Motor Carrier Act, 1993 PA 352, MCL 479.41-43; MSA 22.587(1)(-)(3), which required the Commission to develop and implement a motor carrier safety rating system by January 1, 1995. Since passage of the FAAA Act and the resulting elimination of complaints about rates or services (except for household goods carriers) the Motor Carrier Division has focused more of its resources on the safety issues required by 1993 PA 254. In 1994, the MPSC Motor Carrier Division had 21 positions. After passage of the FAAA Act in August, new application forms were developed, new procedures put into effect and participation by Staff in the Commission's preemption proceeding was required. The Staff ceased accepting filings related to "rates, routes or services" on or about November 15, 1994 and began to accept applications for authority renewal based only on safety and fitness for operating year 1995.

38. Following preemption, the volume of applications for an original certificate of authority increased dramatically because of the changed entry requirements. The new safety rating system required by 1993 PA 352 and made effective January 1, 1995 required Staff to conduct a safety review of all of the new applicants as well as assuring proper insurance. It was evident that many of these applicants were unfamiliar with legal safety requirements such as drug testing and annual vehicle inspections, some did not even have a commercial drivers license. Thus, a significant education component was required in 1995 and the MPSC Staff worked with the Michigan Trucking Association to provide educational resources.

39. For the fiscal year ending 9/30/95, the Legislature has appropriated 2,162,200 to the Public Service Commission from motor carrier fees collected pursuant to the Motor Carrier Act. Of that amount, 1,584,800 was for the Motor Carrier Regulation Division and the remaining 577,400 for overhead and support operations of the Commission such as financial and personnel services and hearing officers. An additional 566,300 was appropriated to the Department of Commerce for support services such as office rent and data processing services. This appropriations act was signed in July of 1994 and did not anticipate the passage of the federal preemption act.

40. The fiscal year 1995-96 budget for the MPSC and the Department of Commerce reflects significantly less resources funded by motor carrier fees. In fiscal year 1994-95, the total motor carrier fees apportioned to the Public Service Commission and the Department of Commerce was $2,728,500. For fiscal year 1995-96, the aforementioned appropriated amount has been reduced to $1,936,000, a reduction of $791,500.

41. The unavailability of the motor carrier fees to support these appropriations would result in the elimination of approximately 22 positions supporting current in the continuing motor carrier regulation functions. A description of the specific functions of the MPSC Motor Carrier Regulation Division and how they are changed by the Federal Act are as follows:

a. Safety and Compliance: this work unit consists of three staff who perform safety evaluations on applicants for a MPSC certificate. They also handle complaints against motor carriers for safety or insurance problems. Prior to 1/1/95, they also handled complaints related to economic regulation. After

the issuance of the Commission order on 1/11/95, T-1281 regarding the motor carrier safety rating system, the complexity of the safety evaluations significantly increased. The size of this unit has not changed as a result of preemption.

b. Rates and Tariffs: this work unit currently consists of one staff person who handles economic regulation of the household goods industry and water carriers and the few remaining elements of motor carrier rate regulation as provided by the FAAA Act, 49 USC 11501. Prior to 1/1/95, this unit also included an auditor. This position was eliminated due to preemption.

c. Authorities: this work component of the Operations Section consists of three staff persons who process applications for MPSC certificates. This administrative function involves working with applicants on requirements, notices, legal sufficiency of documents and preparation of orders and certificates. Prior to 1/1/95, this work component had four staff, one staff position has been eliminated due to preemption by the FAAA Act.

d. Revenue Collection and Issuance of Credentials: The remaining staff positions of the Operations Section handle the various fee collections, issuance of decals and SSRS receipts and maintain a walk-in over-the-counter service for motor carriers. This function currently utilizes nine staff positions, but

prior to preemption utilized 10 staff positions.

e. Management: The Motor Carrier Regulation Division also has a director and secretary.

REBUTTAL TO TNT HOLLAND'S AFFIDAVIT

44. Affiant has reviewed the intervenor's motion for summary disposition in this case as well as the affidavit of Mr. James C Crozier of TNT Holland Motor Express, Inc.

45. Affiant has a general knowledge of TNT Holland's operations in the State of Michigan based on several years of regulatory oversight. TNT Holland is a major intrastate motor carrier which generated over $11.8 million in strictly intrastate revenue in 1993. TNT Holland is the 5th largest general commodity motor carrier in terms of intrastate revenue and increased its intrastate revenue 27% in 1993 over 1992. TNT Holland operates a network of 7 terminals in the State of Michigan from which it makes daily pickups and deliveries to hundreds if not thousands of customers. It also has contracts with numerous large shippers which involve significant intrastate business. By its own admission it uses in excess of 1,300 trucks or tractors in intrastate commerce.

46. Mr. Crozier takes the position that TNT Holland's intrastate operations are incidental to its interstate operations and therefore the intrastate vehicle fee imposed by 478.2(1) is a burden on interstate commerce rather than intrastate commerce. The scope of operation described above demonstrates the contrary.

47. TNT Holland is a well managed, efficient and profitable motor carrier. Management decides which vehicles are to be used for intrastate operations based on the judgement that they will generate intrastate revenue. Those vehicles not

used in Michigan intrastate commerce are not subject to the $100 vehicle fee.

48. Mr. Crozier states that TNT Holland engages in intrastate commerce in 17 states. Many of those states continue to regulate the intrastate operation of motor carriers and collect a certificate application fee, a renewal fee and an annual vehicle fee just like Michigan does. (See **Exhibit B**).

49. Throughout the arguments of plaintiffs is the underlying premise that the 478.2(1) fee is an "interstate" fee and therefore a burden on interstate commerce. It is an intrastate fee. Interstate motor carriers pay vehicle specific fees pursuant to MCL 478.2(2) or 478.7 of the Motor Carrier Act. TNT Holland pays the intrastate vehicle fee, 478.2(1) for intrastate operations which generate revenues, and utilize state highways and police protection. If plaintiffs' arguments were accepted, any motor carrier with ICC authority could avoid paying state fees or taxes for intrastate operations. 478.2(1) is fair because all vehicles used in intrastate commerce pay the same fee in exchange for police protection and use of state highways.

50. Intervenors argue that a fee which affects interstate commerce must be apportioned or otherwise factored on a mileage basis or exposure criteria. The argument is fallacious. The Single State Registration Program (federally authorized), is based on a flat fee of $10.00 or less per vehicle. The Michigan vehicle registration fee to obtain license plates is based on vehicle weight. The so-called "flat fees" are administratively simple and efficient. The American Trucking Association for years has fought against distance taxes as being too inefficient and difficult to administer.

51. If every state in the Union adopted MCL 478.2(1) there could be no multiplicity of fees because the fees relate only to Michigan intrastate authority.

Further, affiant sayeth not.

Thomas R. Lonergan

Subscribed and sworn to before me

this **14th** day of **September,** **1995**.

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

TROY CAB, INC., et al,

Plaintiffs,

v

File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

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_____/

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AFFIDAVIT OF TIMOTHY J. YUNGFER

Captain Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant is a Captain, Commanding Officer of the Motor Carrier Division of the Department of State Police, located at 300 N. Clippert, Lansing, Michigan 48913.

2. The Motor Carrier Division, Department of State Police, is responsible for promoting safety upon the highways through enforcement of state and federal laws relating to commercial vehicles and their use of the highways, including the provisions of the Motor Carrier Act (Act No. 254

of the Public Acts of 1933), the Motor Carrier Safety Act (Act No. 181 of the Public Acts of 1963), the Michigan Vehicle Code (Act No. 300 of the Public Acts of 1949) and the Fire Prevention Act (Act No. 207 of the Public Acts of 1941).

3. The Motor Carrier Division of the Department of State Police employs approximately 165 inspection and enforcement officers and 13 clerical personnel to carry out the various functions and duties of the Motor Carrier Division throughout the State of Michigan.

4. Approximately 40 of the uniformed enforcement officers are assigned to road patrol duties at state police posts throughout the state, and 68 uniformed officers are assigned to individual scale sites.

5. The uniformed officers have full enforcement authority to enforce all of the general laws of the state as they pertain to commercial vehicles.

6. There exists in the Motor Carrier Division four specialized groups which carry out specific functions promoting safety upon the highways through enforcement of laws relating to commercial vehicles and their operations.

7. The first specialized group is the Investigative Section made up of three uniform officers and a supervisory sergeant. The investigative section is responsible for reviewing complaints processed through the Michigan Public Service Commission. The primary focus of the Investigative Section as of May 1995 has been to conduct safety compliance review of motor carriers at their terminals or corporate offices within the state. A safety compliance review may include an on-site inspection of the motor carrier's log books and files to determine if applicable motor carrier safety regulations are being followed. The investigative section is also responsible for on-site safety inspections of the motor carrier's vehicles at the terminal.

8. The second specialized group is the Hazardous Materials Section comprised of 11 uniformed enforcement officers and a sergeant supervisor. This section is responsible the enforcement of safety regulations related to the transportation of hazardous materials.

9. The third specialized group is the Management Audit Section. This section is comprised of three uniformed officers and a supervisory sergeant. The Management Audit Section is primarily responsible for conducting safety audits known as compliance reviews on interstate and intrastate motor carriers utilizing the United States Department of Transportation safety rating system.

10. The fourth specialized section is the Bus Inspection Section, comprised of twelve inspectors and uniformed enforcement officers supervised by a sergeant. This section is responsible for ensuring that all school buses meet safety and equipment standards required by state law.

11. In addition to the four specialized groups, the enforcement officers assigned to road patrol throughout the state conduct safety inspections of commercial vehicles stopped on the highways. Road patrol officers are also responsible for the enforcement of the criminal laws and general regulations pertaining to the operation of commercial vehicles on the highway, including the enforcement of moving violations and size and weight laws.

12. Enforcement officers assigned to scale facilities throughout the state to promote safety upon the highways and protect highway infrastructure by enforcing size and weight laws, conducting driver and vehicle safety inspections of commercial vehicles, and inspecting for proof of registration, operating authority, proof of insurance, and documentation that taxes and fees have been paid.

13. During the 1993/1994 fiscal year, the Motor Carrier Division received and appropriation of approximately $14 million, allocated in the following manner.

a. $2,553,700 from Motor Carrier Fees collected under the provision of the Motor Carrier Act.

b. $944,100 from the Michigan Truck Safety Commission.

c. $5,944,000 from the State Trunkline Fund.

d. $2,553,700 from the federal Motor Carrier Safety Assistance Program. States receiving funds under this program are required to contribute 20% of the funds received for the grant. Motor Carrier Fees are used, in part, as the state match.

e. $749,100 from the state general fund for school bus inspections.

f. $368,900 from hazardous materials inspection fees.

14. The Department of State Police has received funding from the assessment of fees collected under the provision of The Motor Carrier Act (Act No. 254 of the Public Acts of 1933), for the enforcement of the provisions of The Motor Carrier Act and the enforcement of other safety laws and regulations pertaining to the operation of commercial vehicles, since the transfer of the motor carrier enforcement function to the Department of State Police from the Michigan Public Service Commission by Executive Order in 1982.

15. Since the 1991/92 fiscal year, the Motor Carrier Division of the Department of State Police has received and expended Motor Carrier Fees in accordance with the chart identified as attachment "B".

16. The unavailability of the approximate $2.6 million from motor carrier fees and the subsequent reduction in state matching funds for the motor carrier safety assistance program would result in the elimination of 45 uniform enforcement officer positions (not including the reduction in officers to pay for unemployment benefits) assigned to road patrol and weigh station operations. This represents an approximate one-third reduction in resources utilized to promote safety upon and conserve the use of state highways.

17. Since January 1, 1995, the Motor Carrier Division of the Department of State Police has been in compliance with the Federal Aviation Administration Authorization Act which prohibits states from enforcing any laws or regulations related to the price, route or services of a motor carrier.

Further affiant sayeth not.

_____

Captain Timothy J. Yungfer

Subscribed and sworn to before me

this 14th day of September, 1995.

_____

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
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SUPPLEMENTAL AFFIDAVIT OF TIMOTHY J. YUNGFER

Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant filed a previous Affidavit signed September 14, 1995, in the above captioned matter which inadvertently omitted that the statements were made on personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

2. Also omitted from my original Affidavit signed September 14, 1995 was Attachment "B" referenced in

paragraph 15 which shows appropriations received and expended by the Motor Carrier Division of the Department of State Police since 1991-1992 fiscal year. Attachment "B" is included with this Supplemental Affidavit.

3. Affiant has reviewed the contents of the Affidavit signed on September 14, 1995, and states affirmatively that the contents of the Affidavit are made on Affiant's personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

Further, Affiant sayeth not.

_____
Timothy J. Yungfer

Subscribed and sworn to before me
this 20th day of September, 1995.

_____
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

Prepared by Paul Walters 9/19/95

		Prorated Expenses*		
Fiscal Year	Appropriated Motor Carrier Fees	General Enforce-ment	Safety Inspections	Unexpended Motor Carrier Fees
1991/92	2,484,100	2,252.641	149,840	81,619
1992/93	2,484,100	2,323.966	143,234	16,900
1993/94	2,553,700	2,158,607	146,535	250,553
1994/95	2,571,400	2,332,703	144,864	93,833
1995/96	2,664,100			

*Fiscal Year 1994/95 are projected through year end.
Expenses are prorated to percentage of funding from Motor Carrier Fees attributable to the General Enforcement and Safety Inspection Programs